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Federal Communications Commission
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June 4, 1997

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: Metro Broadcasters-Texas, Inc.
MM Docket No. 97-91; RM-8854
Lewisville, Gainesville, Robinson, Corsicana,
Jacksboro, and Mineral Wells, Texas

Dear Mr. Caton:

Transmitted herewith on behalf of Metro Broadcasters-Texas, Inc., are an original and four copies of its "Opposition to Motion to Strike" in the above-referenced proceeding. This opposition is being filed in response to a "Motion to Strike or, Alternatively, Motion for Leave to File Further Reply, and Further Reply", filed May 28, 1997, by Heftel Broadcasting Corporation.

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,



Andrew S. Kersting
Counsel for Metro Broadcasters-Texas, Inc.

Enclosures
cc (w/ encl.): Certificate of Service

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Federal Communications Commission
Office of Secretary

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations
(Lewisville, Gainesville, Robinson,
Corsicana, Jacksboro, and
Mineral Wells, Texas)

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MM Docket No. 97-91
RM-8854

To: Chief, Allocations Branch

OPPOSITION TO MOTION TO STRIKE

Metro Broadcasters-Texas, Inc. ("Metro"), licensee of Station KHYI(FM), Howe, Texas, by counsel, hereby submits its opposition to the "Motion to Strike or, Alternatively, Motion for Leave to File Further Reply, and Further Reply," filed May 28, 1997 ("Motion"), by Heftel Broadcasting Corporation ("Heftel") in connection with the *Notice of Proposed Rulemaking and Order to Show Cause*, 12 FCC Rcd 3059 (Chief, Allocations Branch 1997) ("NPRM"), in the above-captioned proceeding. In support of this opposition, the following is stated:

I.

Heftel's Motion to Strike

Heftel contends that Section I of Metro's Reply Comments should be stricken because the material contained therein "does not reply to any matter which was even remotely referred to in the Comments which Heftel filed May 5, 1997."¹ Motion, p. 2. However, the statements contained in Section I of Metro's Reply Comments respond directly to the argument set forth in the Heftel's

¹ Section I of Metro's Reply Comments establishes that Heftel failed to protect the reference coordinates for the existing Channel 240C1 allotment at Mineral Wells, Texas.

Comments beginning with the first full paragraph on page 11 and continuing through the first paragraph on page 12.

At page 11 of its Comments, Heftel acknowledged the existing allotment of Channel 240C1 at Mineral Wells and stated:

An essential part of the reallocation proposal advanced by Heftel in its Petition is to change the allotment for Station KYXS-FM from Channel 240C1 to Channel 240C3 at Mineral Wells.

Heftel Comments, p. 11 (footnotes omitted). Heftel noted that its proposal to allot Channel 300C1 to Lewisville is dependent upon, *inter alia*, the downgrade of Channel 240 at Mineral Wells from Class C1 to Class C3. *Id.* at n.7. Heftel also noted that the Class C1 facility at Mineral Wells has not been constructed, and that the construction permit for that facility was cancelled by the Commission in December 1993. *Id.* at n.8. Although Heftel acknowledged that Jerry Snyder and Associates, Inc. has a pending application proposing to implement the Class C1 upgrade, Heftel argued that its proposal would better serve the public interest because it would result in improved service to a greater population and area than the Class C1 facility at Mineral Wells. *Id.* at 12-14.

Section I of Metro's Reply Comments responds directly to the allegations set forth above. *See* Metro's Reply Comments, pp. 1-3. Indeed, Heftel's pleading is a transparent attempt to supplement the record in this proceeding under the guise of a "motion to strike." Out of its six and one-half page pleading, Heftel devotes only three sentences of text to its claim that Metro's Reply Comments are not responsive to its Comments. *See* Motion, p. 2. Therefore, Heftel's Motion should not be considered. Moreover, because there is no good-faith basis to support Heftel's allegation that Section I of Metro's Reply Comments "does not reply to any matter . . . even remotely

*referred to*² in Heftel's Comments, Heftel's Motion constitutes a frivolous pleading under Section 1.52 of the Commission's rules and should be summarily dismissed. See *Public Notice*, 11 FCC Rcd 3030 (1996) ("*Commission Taking Tough Measures Against Frivolous Pleadings*").

II.

Heftel's Motion for Leave to File Further Reply, and Further Reply

In an effort to supplement its May 20, 1997, Reply Comments, Heftel contends that the Commission's statements in *Driscoll, Gregory and Robstown, Texas*, 9 FCC Rcd 3580, n. 3 (Chief, Allocations Branch 1994), and *Martin and Tiptonville, Tennessee*, 11 FCC Rcd 12695 (Chief, Allocations Branch 1996), to the effect that the Commission will not delete a channel where an expression of interest is demonstrated by the initial comment deadline, are mere dicta. According to Heftel, the Commission will not necessarily dismiss a rulemaking proposal where there is an alternative channel available (e.g., 240C3) without comparing the public interest benefits of the pending application *vis-a-vis* the rulemaking proposal. Motion, pp. 4-6.

Despite Heftel's claims, the Commission's statements in *Driscoll* and *Martin* accurately reflect its general policy concerning the deletion of vacant allotments. It is well settled that the Commission will not delete a channel in which an interest has been expressed. Where an interest in a channel is expressed prior to the initial comment deadline, the basis for deletion of the channel is no longer valid, and the rulemaking petition will be denied. See, e.g., *Calhoun City, Mississippi*, 11 FCC Rcd 7660 (Chief, Allocations Branch 1996); *Greenfield and Stockton, Missouri*, 10 FCC Rcd 5481 (Chief, Allocations Branch 1995) (NPRM); *Woodville, Mississippi and Clayton, Louisiana*, 9 FCC Rcd 2769 (Chief, Allocations Branch 1994). Heftel's position is so completely

² Motion, p. 2 (emphasis added).

at odds with Commission precedent that the petitioner apparently could not find even one case to support its novel proposition. *See* Motion, pp. 3-7.

Moreover, there is nothing unusual about the Commission applying its general policy in *Driscoll*, even though approval of the proposal would require the deletion of a community's sole FM allotment. For example, in *Cheyenne and Saratoga, Wyoming*, 11 FCC Rcd 1073 (Chief, Allocations Branch 1996), the Commission allotted Channel 260A to Cheyenne as a fifth local FM service and deleted a vacant Class C allotment at Saratoga, even though the vacant channel at Saratoga was the only FM allotment to that community.³ *See also Augusta, Gibson and Thomson, Georgia*, 11 FCC Rcd 12702 (Chief, Allocations Branch 1996) (NPRM); *Coleman, Sebewaing, and Tuscola, Michigan*, 11 FCC Rcd 11286, 11288 (Chief, Allocations Branch 1996).

Furthermore, although Heftel claims that the Commission's policy of not deleting a vacant channel where there has been an expression of interest should not apply where the expression of interest involves the upgrade of an existing station, rather than a new service, the Commission has not made such a distinction. Heftel again failed to cite even one case to support its position.

Finally, Heftel's contention that the public interest benefits of the Class C1 upgrade at Mineral Wells should be compared with those of Heftel's proposal is not supported by Commission precedent. For example, in *Calhoun City, Mississippi* and *Woodville, Mississippi and Clayton, Louisiana*, the Commission did not undertake a comparative analysis of the respective public interest benefits of the proposed upgrades and the new services to be provided by those expressing an interest


³ In its Notice of Proposed Rule Making, 10 FCC Rcd 6722, 6723 (Chief, Allocations Branch 1995), the Commission stated that absent an expression of interest in the Class C allotment at Saratoga, it would not allot a substitute equivalent channel to that community even though such a channel was available.

in the vacant allotments in each of those proceedings. The Commission's sole consideration was that an expression of interest had been filed during the initial comment period, which eliminated the basis for the proposed deletion of the channel. *See Calhoun City*, 11 FCC Rcd 7660; *Woodville, Mississippi and Clayton, Louisiana*, 9 FCC Rcd 2769. Therefore, because Heftel failed to protect the reference coordinates for the existing Channel 240C1 allotment at Mineral Wells, and has not offered any legal basis for its failure to do so, Heftel's Motion should be denied and the proposal set forth in the *NPRM* should not be adopted.

WHEREFORE, in light of the foregoing, Metro Broadcasters-Texas, Inc. respectfully requests that the "Motion to Strike or, Alternatively, Motion for Leave to File Further Reply, and Further Reply," filed May 28, 1997, by Heftel Broadcasting Corporation, be DENIED in all respects.

Respectfully submitted,

METRO BROADCASTERS-TEXAS, INC.

By: 
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June 4, 1997

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CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 4th day of June, 1997, copies of the foregoing Opposition to Motion to Strike were hand delivered or mailed first-class, postage pre-paid, to the following:

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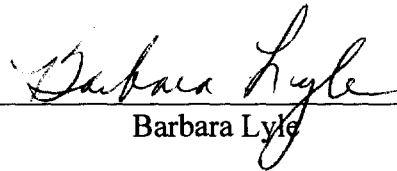
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